

## Fair Political Practices Commission

### Memorandum

**To:** Chairman Getman, Commissioners Downey, Knox, Scott, and Swanson  
**From:** William L. Williams, Jr., Staff Counsel  
John W. Wallace, Assistant General Counsel  
Luisa Menchaca, General Counsel  
**Subject:** Conflict of Interest Regulations Improvement Project - Adoption  
Proposed Amendments to Regulations 18232, 18702.1, 18705.5, 18706,  
and 18708  
**Date:** November 16, 2001

---

### INTRODUCTION

At the October 2001 Commission meeting, staff presented a status report and several technical amendments to the conflict of interest regulations as a follow-up to the implementation of Phase 2 of the Conflict of Interest Regulations Improvement Project. The Commission approved to be noticed for adoption, clarifying amendments to regulations 18232, 18705.5 and 18708.<sup>1</sup> Commissioner Swanson raised an additional issue as to the time frame for reimbursement of expenses set forth in regulation 18232, which is also addressed herein.

Finally, attorney Michael Martello, representing the League of Cities addressed the Commission regarding the need for a clarifying amendment to regulation 18702.1. Accordingly, in this memorandum staff presents to the Commission for consideration and adoption proposed amendments to regulations 18232, 18702.1, 18705.5, and 18708.

In addition, this item includes consideration of the adoption of amendments to regulation 18706. These amendments to regulation 18706 were also considered by the Commission in October under a separate memorandum and the Commission approved the notice of the proposed amendments. We have merged this in with the other Conflict of Interest Regulations Improvement Project items to be considered for adoption for the Commission's convenience.<sup>2</sup>

### PROPOSED AMENDMENTS

**Regulation 18232:** Government Code section 82030(b)(2) excludes from the statutory definition of "income" certain payments to an official from state, local, or federal government agencies. Regulation 18232 provides definitions to the terms used in this exception such as "salary" and "per diem." Among the items included under the

---

<sup>1</sup> Unless otherwise specified herein, all citations are to the Act at Government Code §§ 81000 – 91014. All regulatory citations are to Commission regulations at Title 2, §§ 18109-18997, of the California Code of Regulations.

<sup>2</sup> All of the proposed amendments to the regulations are set forth in Appendix A.

definition of “salary” are “consultants’ fees.” An issue has arisen, in that the term “consultants’ fees” as used in the regulation could be construed too broadly to include independent contractor fees paid to persons not defined as a “consultant” under regulation 18701(a)(2). This broad interpretation would be a change from prior Commission advice to the effect that the exception only applies where the individual is a “consultant” as defined in regulation 18701. Staff is presenting to the Commission for adoption a clarifying amendment specifically delineating the scope of the exception and bringing the exception in line with past advice. This amendment will link the term “consultant” as used in regulation 18232 to the definition of “consultant” contained in regulation 18701(a)(2) to comport with the Commission’s intent as to the scope of the exclusion of “salary” from income.

Staff Recommendation: The staff recommends that the Commission adopt the proposed amendment.

Another issue with this regulation is that the current 60-day time period for reimbursement of expenses (which are excludable from statutory definition of income under Gov. Code § 82030) set forth in (c) of the regulation may be too short. A review of the regulatory file indicates that this regulation was enacted to codify *In re Moore* (1977) 3 FPPC Ops. 33. *Moore* held that pension payments to a public employee retiree came within the income exclusion of § 82030(b)(2). Section 82030(b)(2) expressly excludes “reimbursement for expenses” from income. The regulatory file indicates that the inclusion of “reimbursement for expenses” in the regulation was to implement that statutory provision. The regulatory file contains no discussion as to the basis for selection of the 60-day time period for expense reimbursement. The 60-day time period appears to be a reasonable time for submission and reimbursement of expenses, and is consistent with the state’s own personnel regulations which provide for monthly submission of claim(s) for expense reimbursement. (Cal. Code Regs., tit. 2, §§ 599.638, 599.638.1.) There were no negative comments from the regulated community with regard to the 60-day time frame during the Phase 2 hearings or the recent “Interested Persons” meeting on the impact of the Phase 2 regulatory changes. However, there is no policy reason why expenses reimbursed up to 90-days after they are incurred should not be covered by the exception in the regulation. Staff is presenting to the Commission for consideration an amendment extending the time period for expense reimbursement from 60 to 90 days.

Staff Recommendation: Staff is making no recommendation because there have been no negative repercussions under the current language. However, there would be no substantive harm in extending the reimbursement period from 60 to 90 days. Therefore, this is an issue of the Commission’s preference.

**Regulation 18702.1:** Regulation 18702.1 sets forth an official’s obligations after an official determines that a conflict of interest exists. Two issues were contemplated to be resolved by the amendment to this regulation. The first issue was raised at the October Commission meeting and concerned public officials who inadvertently receive nonpublic information regarding a decision and whether this receipt should be considered

a violation of the regulation. An additional issue has arisen since the October meeting with regard to a lack of clarity under subdivision (c) of the regulation prohibiting a public official's presence during a closed session on the decision from which he or she is disqualified. There is a concern that a public official may believe he or she could be present for deliberations during closed session on matters for which he or she is disqualified.<sup>3</sup>

Staff initially considered amendments addressing both of these issues to be technical or clarifying in nature. However, upon further internal review, it has become apparent that the issue of prohibiting attendance at the closed meeting may implicate substantive issues under *Hamilton v. Town of Los Gatos* (1989) 213 Cal.App.3d 1050, and may also have ramifications for the same or similar issues arising under regulation 18708. It also appears that the Commission attempted to at least partially deal with this issue by means of a comment to the regulation regarding the ability of an agency by local rule to address the issues that are the subject of the proposed amendments. In light of this, staff is recommending withdrawal of the amending language regarding the issue as to prohibiting attendance at a closed session meeting.

However, the issue of removing liability for a public official's inadvertent receipt of closed session materials was clearly put before the Commission in the pre-notice hearing, and can be addressed by the Commission. As such, staff is presenting an amendment proposal inserting the word "knowingly" in subdivision (c) to provide that if a public official inadvertently receives nonpublic information regarding such a decision, that it would not be a violation of the regulation.

Staff Recommendation: Staff recommends that the Commission adopt the proposed amendment as it pertains to precluding liability for inadvertent receipt of closed session materials.

**Regulation 18705.5:** This regulation sets out exceptions to the "personal financial effects" rule of section 87103. In December of 2000, the Commission reaffirmed the existing rule that the personal financial effects test would not be applied in cases where a potential conflict of interest could be analyzed under a more specific regulation, such as the regulations for business entities or real property. Staff is presenting to the Commission for adoption a clarifying amendment to the regulation to assure that a public official's indirect interests (interests of his or her immediate family) in business entities will not be analyzed as a personal financial effect.

Staff Recommendation: Staff recommends that the Commission adopt the proposed amendment.

---

<sup>3</sup> Both issues were noticed for Commission consideration. The notice language reads as follows: "(c) During closed meetings of the agency, a disqualified official shall not be present when the decision is considered or attend the meeting, nor shall he or she be entitled to obtain or review a recording or any other non-public information regarding the governmental decision."

**Regulation 18706:** Regulation 18706 defines foreseeability. Foreseeability has been a component of a “conflict of interest” since the voters adopted the Political Reform Act in 1974. It is a necessary component. A conflict of interest will not exist if the material financial effect on an economic interest of the official is not reasonably foreseeable. However, foreseeability has always been a fact-based analysis. In 2000, Commission staff issued the *Olson* Advice Letter, No. A-00-237 where foreseeability was analyzed in the context of real estate professionals. Commission staff identified factors (first identified in *In re Thorner*) that should be considered in the determination of foreseeability.<sup>4</sup> The new proposed regulatory language inserts the *Olson* factors into subdivision (b). Subdivision (c) simply restates existing law that merely holding a real estate sales or brokerage license does not in itself make a material financial effect on the official’s economic interest reasonably foreseeable.<sup>5</sup>

### **Decision Points for Regulation 18706:**

1. Should subdivision (b) containing the *Olson* Factors be incorporated in the regulation?

Staff Recommendation: Yes. Staff believes the factors assist the regulated public in analyzing the foreseeability component of a conflict of interest.

2. Should application of the new subdivision be limited to Real Estate Professionals and/or Real Estate Development Decisions?

While there is no empirical data to suggest that one option is better than another, there are arguments that support both approaches.

**Argument for No Limitation:** The factors themselves are general and can be applied to other contexts, other than those involving public officials who are real estate professionals. For example, contractors may also reap the benefits of increased

---

<sup>4</sup> A more thorough analysis of the background and history of these amendments is contained in the October 2001 Commission Memorandum on this item.

<sup>5</sup> This issue was raised in Assembly Bill 1838 (Ch. 352, Stats. 2000) which stated:

“The Legislature finds and declares that it is necessary for the Fair Political Practices Commission to periodically review and improve the regulations that implement the Political Reform Act of 1974. It is the intent of the Legislature that, in order to prevent an unnecessary chilling of participation in the governmental and regulatory process by public officials of local government agencies, the Fair Political Practices Commission, as part of its Conflict of Interest Regulatory Improvement Project of 1999-2000, shall adopt regulations with respect to those officials that would accomplish all of the following:

“¶....¶

“Clarify that the fact that holding a professional license does not of itself give rise to a disqualifying conflict of interest.”

development in a jurisdiction, just as real estate professionals. In addition there is similar uncertainty as to how foreseeability is evaluated.

For example, in the *Horne* Advice Letter, No. A-00-268, we analyzed whether a development decision would foreseeably affect a public official whose spouse was a contractor. We stated: “At two to three new home projects per year, including work in Placer County, your husband's company has less than one percent of the Nevada County homebuilding market. When the anticipated effects of a decision on a regional market are small, material financial effects on a business that constitutes a small fraction of that market cannot be forecasted without a large measure of speculation. The facts you have provided to us offer no non-speculative basis for a conclusion that decisions relating to the new subdivision are ‘substantially likely’ to have a material financial effect on your husband's business.” Use of the factors assisted staff and the requestor in resolving the foreseeability issue.

Finally, the *Thorner* opinion itself, the genesis of the Commission’s foreseeability analysis, did not apply to public officials who had economic interests related to the real estate industry, but rather dealt with a public official who was a supplier of construction materials and an official whose spouse worked for a corporation specializing in the construction of large commercial structures.

**Argument for Limits:** The strongest argument in favor of limiting these factors to real estate professionals and/or real estate development decisions, is that the issue arose in the context of real estate professionals and the factors were generated in that specific factual context.

In addition, as with any rule or exception, the Commission may want to proceed incrementally. As noted in the prior memorandum on this topic, the regulatory amendment proposed is only the first step in clarifying and defining “foreseeability.”<sup>6</sup> It is uncertain what impact these factors will have on the regulated community once placed in the regulation. Advice letters, by their nature, have a much more limited impact than a regulation. Since the impact of the codification of these factors on the entire eight-step process is uncertain at this time, limiting them initially to the real estate profession would appear prudent.

However, if a limiting factor is needed, staff would recommend that the limiting factor be the nature of the public officials economic interest (i.e. real estate professionals). Limiting the regulation to development decisions raises additional issues

---

<sup>6</sup> We noted: “Since the issuance of the *Olson* Advice Letter, in December 2000, two working group meetings were conducted. Consensus of interested persons was that the *Olson* factors were helpful in dealing with the foreseeability issues. Interested persons also perceived the difficulty in any bright line definition of foreseeability. Since foreseeability is a fact-based determination, setting out a static definition is virtually impossible. However, interested persons also agreed that codification of the *Olson* factors in a regulation would be useful since most city attorneys may not be aware of the letter itself and an advice letter does not constitute a formal Commission interpretation of the statute.”

such as what constitutes a “development” decision. This term would need to be defined in the regulation based on the nature and scope of the decision. However, this would appear redundant since the factors themselves consider the nature and the scope of the decision.

In addition, limiting the factors to real estate professionals also limits the application of the factors to conflicts of interest related to sources of income and business interests which are the economic interests for which the factors were developed. For example, if real property is the triggering economic interest potentially causing disqualification, these factors may be of little relevance, this despite the fact that the issue may still be one involving “real estate development.”<sup>7</sup>

Staff Recommendation: Arguments can be made for either approach. Staff recommends the limited approach. Further, staff believes that limiting the regulation to licensed real estate professionals provides the cleanest limit.

3. Should factor (2) or factor (3) be eliminated, or should these factors be merged? Factor (2) is consideration of the market share held by the official or the official’s source of income in the jurisdiction, and factor (3) is consideration of the extent to which the official or the official’s source of income has competition in the jurisdiction.

In *In re Thorner* (1975) 1 FPPC Ops. 198, the Commission stated:

“McPhail’s has numerous competitors in all of these areas, except ready-mix concrete, where it has only three major competitors. Its estimated relative market share within the MMWD of the foregoing products is: ready-mix concrete-- less than 33 1/3 percent; building materials--less than 25 percent; major appliances--less than 20 percent; fuels--over 50 percent of bottled gas, but less than two percent of the total market since most homes are served natural gas by Pacific Gas and Electric; heating, air conditioning and sheet metal products--less than five percent.”

Staff recommendation: The consideration of “market share” and “competition” are essentially the same factor. In the *Olson* letter they were treated as a single factor and were analyzed using the same facts. Since these factors say the same thing, staff recommends retaining factor (2) and eliminating factor (3).

**Regulation 18708:** If a public official has a disqualifying conflict of interest in a governmental decision, he or she may still participate in a decision if such participation is “legally required.” Regulation 18708 sets forth the standards for this exception. The regulation, as currently written, provides for a 30-day period from the time of the decision to prepare a disclosure document when this exception is used, but does not

---

<sup>7</sup> Please note that the factors in the proposed amendment are not exclusive factors. Whether the decision question is amenable to using the factors in the regulation (such as where the decision is not a development decision) can still be a consideration in providing advice.

specify a time for placement of the disclosure document in a public file maintained by the agency. Staff is presenting to the Commission for adoption a clarifying amendment specifying that the disclosure document must be prepared and placed in a public file within 30-days of the decision.

Staff Recommendation: Staff recommends that the Commission adopt the proposed amendment.

Attachment: Proposed Amendments to Regulations  
18232, 18702.1, 18705.5, 18706, 18708